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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Investigation by the Department of Telecommunications)

and Energy on its own motion pursuant to)

G.L.c. 159, §§ 12 and 16, into Verizon New England) D.T.E. 01-34

d/b/a Verizon Massachusetts' provision of Special)

Access Services)

)

INITIAL COMMENTS OF CTC COMMUNICATIONS, CORPORATION,

LEVEL 3 COMMUNICATIONS, LLC and XO MASSACHUSETTS, INC.

IN RESPONSE TO MOTIONS TO EXPAND SCOPE

I. INTRODUCTION

On March 14, 2001, the Department of Telecommunications and Energy ("Department"), on its own motion opened an investigation into Verizon New England d/b/a Verizon Massachusetts' ("Verizon") provision of Special Access Services pursuant to M.D.T.E. No. 15. The purpose of this investigation is to determine: (1) whether Verizon's special access services are unreasonable under G.L.c. 159, § 16; and (2) if so, what steps Verizon should be required to take to improve its special access services. The Department opened such an investigation because of the numerous complaints it had received concerning long delays and other problems in Verizon's provisioning of special access services and concerning maintenance and repair of existing special access services.

On March 30, 2001, Conversent Communications of Massachusetts LLC ("Conversent")

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filed a Petition to Expand the Scope of the Proceeding to include consideration of Verizon's provision of high capacity unbundled loops that are provided under Verizon Massachusetts' Tariff No. 17. In support of its Petition, Conversent noted that "Verizon routinely misses the six (6) day intervals in its DTE 17 Tariff" and that Conversent "has had great difficulty in obtaining commercially reasonable intervals from Verizon on a consistent basis." Because "the high capacity loops (DS-1s) that Conversent purchases under Verizon's D.T.E. Tariff 17 are technically the same facilities as the DS-1s described in Verizon's Access Tariff," Conversent argues that the Department should expand this investigation to include Verizon's provisioning of unbundled high capacity loops.

On April 6, 2001, AT&T Communications of New England, Inc. ("AT&T") filed a Motion to Expand the Investigation to include all special access services "whether provided pursuant to state or federal tariff." In support of this Motion, AT&T argues that: (a) the Department must investigate all of Verizon's special access offerings because Verizon's inadequate performance has significant local effects on telecommunications consumers in Massachusetts and on competitive carriers offering services in Massachusetts; (b) the Department's investigation, unless expanded to all Verizon's special access offerings, would cover only a small portion of special access services; and (c) the Department has jurisdiction to review Verizon's performance on all special access offerings, even though the terms and conditions of Verizon's special access services under Federal tariff are FCC jurisdictional. Further, in support of its Motion, AT&T describes a decision of the Minnesota PUC on virtually this exact issue, where that PUC found that the FCC and state commissions have shared jurisdiction and that a state commission may legally and must be able to address issues of quality of services offered in the state, regardless of FCC jurisdiction over charges or allocations of costs relative to certain of such services.

CTC Communications Corporation ("CTC"), Level 3 Communications, LLC ("Level 3") and XO Massachusetts, Inc. ("XO") (herein the "Joint Commenters") fully support the efforts of Conversent and AT&T to expand the scope of this proceeding so it will address all performance and quality issues concerning Verizon's special access services - not just the performance and quality issues relating to a limited number of lines that happen to be offered under MDTE Tariff 15, rather than under MDTE Tariff 17 or FCC Tariff 11, or otherwise. Such an expansion is necessary to achieve the Department's objective of addressing and resolving the numerous complaints about Verizon's special access service provisioning, maintenance and repair performance, which in turn have led to "severe customer impacts with adverse business consequences". Vote and Order to Open Investigation, March 14, 2001, p. 2. (1) Certainly, the Joint Commenters have experienced serious problems(2) and urge that it is critical for the Department to take comprehensive and decisive action to ensure expeditious resolution of those serious problems.

II. TO RESOLVE THE SERIOUS PROBLEMS IDENTIFIED, THIS INVESTIGATION MUST ENCOMPASS ALL SPECIAL ACCESS SERVICES REGARDLESS OF GOVERNING TARIFF

As noted in the Conversent and the AT&T Motions, from the customer perspective(3) (at least as to the nature of the service) not only does it not matter under which Tariff the special access service is provided, but the tariff classification is largely transparent to the customer. A review of the various Verizon tariffs(4) confirms this fact. Those tariffs not only contemplate that there is mixed use (interstate and intrastate) on the special access services, but there is a significant overlap between tariffs of the channel types offered. For example, both tariffs cover Digipath, Digital Data, High Capacity and WATS, inter alia. Further, there do not appear to be material differences in the provisioning and servicing of these services depending on the tariff under which they are classified. The special access services under whichever tariff are critical to a CLEC's ability to provide the full range of competitive services and provide the same functionality.

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Additionally, in the context of mixed use access services, Verizon's Federal tariff specifies that "if the customer estimates that the interstate Special Access traffic on the service (line) involved constitutes more than ten percent of the total traffic on the service (line, the service (line) is considered to be jurisdictionally interstate and will be provided in accordance with the applicable rates and regulations in this tariff". TARIFF F.C.C. NO. 11, 1st Revised Page 2-25, section 2.3.10(D)(1)(b). Thus, a considerable portion of special access service facilities will be classified by Verizon as Federal even though up to ninety percent of the traffic going over these facilities may be intrastate in nature.

Therefore, as a practical matter, the Department must expand the scope to have any hope of achieving a solution to the serious problems noted that are having significant impacts on telecommunications consumers and competition in Massachusetts, and as a result, the Massachusetts economy.

III. THE DEPARTMENT HAS JURISDICTION TO ADDRESS SERVICE QUALITY ISSUES IN MASSACHUSETTS REGARDLESS OF THE FILING LOCATION OF THE TARIFF GOVERNING PRICES AND TERMS OF SERVICE

The Department has broad authority over Verizon and its provision of service to consumers (wholesale or retail) in Massachusetts. Specifically, the relevant statutes provide:

If the department is of the opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the department shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used...

G.L. c. 159, section 16.

The Department has relied on such statute to review service quality to consumers of specific services, service quality to consumers in particular locations, generic industry issues such as numbering and number conservation, as well as specific complaints against Verizon. New England Telephone and Telegraph Co., D.P.U. 94-50, pp. 229 et seq. (1995) (service quality index held necessary for price cap regulation); NYNEX/Mission Hill Customers, D.P.U. 96-30 (1997) (service quality reviewed; service outage plan required); NYNEX, D.P.U. 96-106 (1997) (IntraLATA presubscription procedures reviewed); Bell Atlantic, D.T.E. 99-105 (PIC Freeze procedures reviewed); Number Pooling, D.T.E. 01-33. The Department noted its broad supervisory authority to oversee Verizon's "ability to provide high quality telecommunications services, including (1) continued investment in, and upgrade of, Massachusetts telecommunications facilities at a reasonable rates to consumers in the Commonwealth and (2) the continuing development of competition in Massachusetts telecommunications markets. NYNEX/Bell Atlantic Merger, D.P.U. 96-78, p. 3 (1996). Further, the Department has already required Verizon to report on its performance in a number of areas including Special Services. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-84-Phase3-F (1999). The

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comprehensive review of Verizon's provision of special access services in Massachusetts - in terms of service quality and adequacy-- is no less important, and no less properly a matter for the Department's review than many other activities that the Department has undertaken without question. Indeed, the Department has also exercised its supervisory authority to review service quality of electric and gas companies under parallel statutory provisions. See e.g., *Boston Gas Co.*, D.P.U. 96-50 Ph. I pp. 293 et seq. (1996); *Bay State Gas/Northern Indiana Public Service Co.*, D.P.U. 98-31 (1998).

As noted above, some (or much) of the services that fall under Verizon's Federal Special Access tariff, are purely intrastate, but because those services are on the same line as carries interstate traffic, Verizon classifies that as subject to the Federal tariff. This fact should not bar the Department from fulfilling its obligations of: (a) ensuring a sufficient level of service quality for telecommunications services provided in Massachusetts; and (b) taking such actions as may be necessary to ensure the development of competition within the state. Only if the Department's action were to be in conflict with the FCC's regulatory scheme would Department action be restricted. As noted by AT&T, such conflict has to be a very significant conflict to the point where compliance with each of the state and Federal regulatory schemes is impossible and the Federal regulatory scheme must be intended to occupy the entire field. *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368, 369 (1986). For example, the Department is permitted to regulate PIC freezes although the PIC freeze might apply to the customer's interstate traffic.

It seems clear that the FCC is not trying to occupy the field of service quality, so that the Department can review Verizon's special access services provisioning and maintenance without improperly conflicting with any Federal regulatory efforts. In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U.S. West Communications, Inc. Regarding Access Service, 2000 Min. PUC LEXIS 53 (Docket No. p-421/C-99-1183 (August 15, 2000)). The Minnesota PUC correctly found that there was concurrent jurisdiction between states and the FCC and that states could and should take such actions as necessary to ensure service quality.

The Department has previously come to a parallel conclusion in the field of electric regulation. In numerous cases the Department reviewed the performance of electric generators whose only services were offered pursuant to Federal tariff filed with the Federal Energy Regulatory Commission ("FERC"). The Department consistently found that it had such jurisdiction and that such review did not conflict with FERC's jurisdiction. See e.g., *Cambridge Electric Light Co.*, D.P.U. 91-59, pp. 313 (1992); *Cambridge Electric Light Co.*, D.P.U. 86-70 (1986). Further, the Department has reasoned that, to protect the interests of consumers in Massachusetts, it had to review the performance of electric generators that provided service to the electric companies that sold at retail in Massachusetts. The Massachusetts Supreme Judicial Court ruled that the Department properly exercised its jurisdiction in those circumstances. *Commonwealth Electric Company v. Department of Public Utilities*, (1986) 491 N.E.2d 1035, 397 Mass. 361, cert. den. 107 S.Ct. 1971, 481 U.S. 1036, 95 L.Ed. 2d 812. That ruling is quite instructive here. The Court stated:

In considering a preemptive argument, we note that preemptive "is not favored, and State laws should be upheld unless a conflict with Federal law is clear." *Attorney Gen. v. Travelers Ins. Co.*, 385 Mass. 598, 602 (1982), vacated 463 U.S. 1221 (1983), reaffirmed, 391 Mass. 730 (1984), aff'd sub nom. *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985). See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *Commonwealth v. McHugh*, 326 Mass. 249, 265-266 (1950). The burden is on the party seeking to displace the State action to show preemption with hard evidence of conflict based on the record. *Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge*, 395 Mass. 535, 545 (1985).

Id. at 375-376.

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Just as the Department there could review the prudence of the actions of an electric distribution company's power purchasing decisions without conflict with a Federal scheme of rate regulation, so can the Department here review Verizon's performance and quality of service for special access without disturbing Federal tariff review jurisdiction. There is no conflict of regulatory activities and the Department should exercise its broad authority to review Verizon's performance on all special access services, regardless of which tariff specifies the terms of the service.

IV. CONCLUSION

For the reasons set forth herein, the Joint Commenters support the Motions of Conversent and AT&T to expand the scope of this proceeding to include all Special Access Services, regardless of the tariff under which such services are provided.

Respectfully submitted,

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1 The tack Verizon has already taken in response to the initial information requests from the Department, i.e. that services offered under Federal tariff are beyond the scope of this proceeding, would make a mockery of this proceeding and allow Verizon effectively to dictate what performance the Department could review and what it could not.

2.

2 As discussed at the public hearing in this matter, long delays in provisioning and inadequate repair and maintenance performance have seriously compromised carriers' business efforts.

3.

3 Notably the "customer" as relevant to this proceeding is both the ultimate consumer, as well as the competitive carrier that must depend upon Verizon for timely provisioning of the services.

4.

4 See, Tariff F.C.C. NO. 11, Tariff DTE MA No. 15